

Kumar v. Gonzales*, No. 03-74463*JUL 11 2006**

BERZON, Circuit Judge, dissenting:

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

I dissent.

The IJ's adverse credibility determination is not, in my view, supported by substantial evidence. Kumar's statements during his asylum interview did not contradict his later testimony. As Kumar explained, he was never asked during his asylum interview how many total hours a month he worked at the YMCA. His responses during that interview, therefore, do not contradict his testimony at the hearing, in which Kumar said that he ran a monthly camp for the YMCA and also worked there every weekend, distributing medicine to villages.

Crediting Kumar's testimony, the question then becomes whether the IJ properly determined that there was no past persecution and no well-founded fear of future persecution. First, it is not clear that the IJ ever reached a determination regarding past persecution. Second, if he did, his determination was clearly improper. Kumar was detained for nearly a week by the police, during which time he was frequently beaten. An earlier round of detention by members of the Shiv Sena, a radical Hindu group, left him with physical injuries severe enough to warrant hospitalization. Under our case law, treatment of this kind amounts to persecution. *See Ndom v. Ashcroft*, 384 F.3d 743, 752 (9th Cir. 2004) (stating that "[a]lthough brief detentions, without more, can be insufficient to establish

persecution,” longer periods of detention, coupled with other types of harmful treatment, qualify as persecution); *Chand v. INS*, 222 F.3d 1066, 1075 (9th Cir. 2000) (noting the Ninth Circuit’s “consistent practice of finding persecution where the petitioner was physically harmed”).

Because Kumar established past persecution, he is entitled to a presumption of a well-founded fear of future persecution. *See Ndom*, 384 F.3d at 756; 8 C.F.R. § 208.16(b)(1)(i). The IJ’s determination on the question of well-founded fear, pertinent both to the grant of asylum and eligibility for withholding of removal, therefore cannot stand.

I would either remand for a finding regarding past persecution or reverse the determination regarding past persecution and remand for findings concerning well-founded fear of future persecution, taking into account the applicable presumption. *See INS v. Orlando Ventura*, 537 U.S. 13, 16-17 (2002) (holding that a court of appeals is generally not empowered to conduct a de novo inquiry into a matter entrusted by law to the agency). Because the majority does neither, I respectfully dissent.